

I must state here that the operative and relevant words in *Harrison v. Harrison* are "if something is brought to his attention which he had not sufficiently considered". I have to emphasize on these words for reason that although the hearing of the Originating Summons concluded on 15th August 1973, the written judgment was not delivered until 8th October 1973, in other words the court did in fact take time to consider the matter carefully before putting its findings in the form of written judgment.

Counsel for the applicants invited the court's attention to *Halsbury's* Vol. 22 page 772 paragraph 1645. What this paragraph lays down is the procedure to be adopted in the matter of obtaining variation of minutes. Here it must be emphasized that minutes taken down by the Registrar of an order made by a judge is quite a different thing from a written judgment. In a case where there is a written judgment any dispute as to the minutes can quite easily be put right by reference to the written judgment. I do not therefore think that the passage from *Halsbury's* can be of any assistance in the present matter. In *Tong Lee Hwa and Anor. v. Chin Ah Kwi*<sup>(2)</sup> at page 79 Gill F.J. said:

"After a judgment by consent has been passed and entered, it cannot afterwards be varied on the ground of mistake, except for reasons sufficient to set aside an agreement. The general rule is that after a judgment has been passed and entered, even where it has been taken by consent and under a mistake, the court cannot set it aside otherwise than in a fresh action brought for the purpose unless (a) there has been a clerical mistake, or (b) the judgment as drawn up does not correctly state what the court actually decided and intended to decide, in either of which cases the application may be made by motion in the action. The same rule must apply, *a fortiori*, where the parties have entered into an agreement in pursuance of the terms of settlement embodied in the consent order."

With due respect to counsel for the applicant, I cannot see that there has been a clerical mistake or error in the judgment but I must say that as far as I am concerned, my written judgment correctly states what I actually decided and intended to decide. For this reason, I hold that my judgment cannot be varied at this stage.

Some doubt was expressed by counsel for the respondents as to who should call the 13th adjourned Annual General Meeting. Paragraph 18(a) of my judgment indicates that the meeting is to be called within one week from the date of the service of the order on the second respondent as chairman of the first respondent company. It was my intention that the meeting should be called by the second respondent as chairman of the first respondent company and I confirm it is he who should call such meeting.

Due to the delay occasioned in settling the terms of the order it may now not be possible for the meetings to be called within the time stipulated in my judgment. It would now be up to either party concerned to make such application (if necessary) to the court for enlargement of time under Order 64 rule 7 to the calling of the meetings.

The Notice of Motion is dismissed with the costs to be paid by the applicants personally.

*Order accordingly.*

## KHAW KOK SIN & ANOR. v. KHAW GIM LEONG CO. SDN. BHD. & ORS.

[O.C.J. (Chang Min Tat J.) December 14, 1973]  
[Penang — Civil Suit No. 203 of 1973]

*Practice and Procedure — R.S.C. 1957, O. 25 r. 4 — Whether evidence admissible or necessary — Inherent jurisdiction of court.*

On an application for stay of an action under O. 25 r. 4 of the Rules of the Supreme Court only the statement of claim may be looked at but under the inherent jurisdiction of the court affidavit evidence may be received.

Cases referred to:-

(1) *Day v. William Hill (Park Lane) Ltd.* [1949] 1 K.B. 632 C.A.

(2) *Willis v. Earl Howe* [1893] 2 Ch. 551

### CIVIL SUIT.

*Gan Teik Chee* for plaintiffs.

*T. R. Hepworth* for defendants.

**Chang Min Tat J.:** This is a family dispute. The two plaintiffs and the third defendant are brothers. The two companies named as defendants are family concerns. All the three brothers are directors, the third defendant being the managing director.

As at 31 December 1972, as alleged in the statement of claim the first plaintiff had \$23,764.76 and \$3,561.09 and the second plaintiff had \$29,923.95 and \$6,166.72 in continuing credit accounts in the two companies. On 22 June 1973, each plaintiff withdrew a sum of \$2,900 from his account with first defendant and at the same time demanded payment of the balance. Each also demanded payment of the balance in the other account.

When their demands were not met, they commenced this action for a declaration that the sums were held in trust for them, payment and interests.

Appearance was entered and an application by summons-in-chambers was made for a stay of the proceedings on the ground that the action was frivolous and vexatious and an abuse of the process of the court.

At about the same time, an application was made by the plaintiffs for certain amendments of the amounts claimed and for signing of judgment.

Both summonses were heard by me in Chambers on 14 September 1973. They were fully argued, but at the end, a suggestion was thrown out that a settlement might be reached. Since this settlement has not materialised, I have now to rule on the applications.

The application for stay was said to be made under O.25 r.4 Rules of the Supreme Court and also under O.19 r.27.

It would perhaps be convenient if at this stage, I express the opinion that the application is not so much to strike out as unnecessary or scandalous pleadings or pleadings which may tend to prejudice, embarrass or delay the fair trial of the action, as provided for in O.19 r.27, as an application for stay under O.25 r.4. A stay could also be made under the inherent jurisdiction of the court.

Learned counsel for the defendants relied on *Day v. William Hill (Park Lane) Ltd.*<sup>(1)</sup> for the proposition that in such an application, affidavits could be filed and could be read.

Inasmuch as in this case it was generally considered that the affidavit was totally unnecessary and the documents which it exhibited were referred to in the statement of claim and were therefore available to the court, this may perhaps not be so clear an authority. With respect, perhaps a clearer authority is *Willis v. Earl Howe*.<sup>(2)</sup> But the practice is clear. In an application under O.25 r.4 only the statement of claim could be looked at but under the inherent jurisdiction of the court, affidavit evidence may be received.

The affidavits reveal, if I may so summarise the statements contained therein, the desirability and perhaps the need for retaining the plaintiffs' moneys in the companies for the viability of the companies, since the companies operate on overdraft facilities from certain banks, but in my view unless it is established that there is a contractual duty or an obligation binding at law on the plaintiffs to keep their moneys in the companies, there can be, it seems with respect to me, no valid reason why the plaintiffs should be deprived of their moneys. It may be, as the affidavits filed on behalf of the defendants aver, that apart from the need for liquidity, there is such an obligation from the trust that arose on the formation of the companies, but this with respect is a different thing from saying that the claim is vexatious or should be stayed in the inherent jurisdiction.

In the course of the arguments, an objection was taken, and if I may say so without respect, would seem to be well taken that no cause of action has been disclosed against the third defendant, since the first two defendants being registered companies were legal entities and could act for themselves through their officials without necessity of joining in their managing director or any officials personally. But in the objection that was in fact taken, no prayer was sought to strike out the third defendant. I think I should now await such an application before I so rule.

With respect to the application to sign final judgment, with respect, the figures, even when the amendment that was sought is allowed, do not as a matter of arithmetic come to the amounts judgment is asked for. Further amendments with perhaps additional information may be necessary to disclose these amounts, but in venturing this suggestion, I must not be taken to indicate that there has been shown no defence on the merits that would not call for a hearing.

In the result, the application for a stay is dismissed, as well as the application to sign final judgment. The fairest order on costs I could think of to fit the circumstances is that each party will bear its own costs.

In case it is desired to take these matters a stage beyond, I now certify that I require no further arguments.

*Application dismissed.*

Solicitors: *Lim Kean Siew & Co.; Allen & Gledhill.*

# A M.C. PERERA & ORS. v. N. PONNUSAMY & ORS.

[O.C.J. (Mohamed Azmi J.) December 24, 1973]

[Kuala Lumpur — Civil Suit No. 204 of 1973]

*Practice and Procedure — R.S.C. 1957 — Order under O. 32 r. 6 — Condition in — Failure to comply with condition — Order therefore waived or abandoned under O. 42 r. 2.*

The plaintiffs obtained an interim injunction restraining the defendants from proceeding with the annual general meeting of the branch of the political party to which all the parties to this action were members unless the plaintiffs and 176 others had been given notice of the meeting and were permitted to attend and vote thereat.

The defendants' application to set aside the interim injunction was dismissed as there was a serious question to be tried. The plaintiffs then applied for an order that the defendants be perpetually restrained from holding the meeting unless the plaintiffs and 176 others were given notice of the meeting and were permitted to attend and vote thereat.

The judge granted the order on condition that the plaintiffs filed the particulars of themselves and the 176 others within a time set by the judge. The plaintiffs failed to comply with this condition.

**Held:** the plaintiffs had failed to comply with the condition imposed by the order of court and by such failure the order had been waived or abandoned by the plaintiffs under R.S.C., O. 42 r. 2.

## CIVIL SUIT.

*S. A. Raj* for applicants/defendants.

*G. Vadiveloo* for respondents/plaintiffs.

**Mohamed Azmi J.:** This is an appeal against my decision made on December 24, 1973 wherein I held that the plaintiffs had failed to comply with the conditional order made in their favour dated October 10, 1973.

This case involves a dispute between members of the Semenyih Branch of the Malaysian Indian Congress. The facts leading to the present appeal are as follows. By *ex-parte* summons-in-chambers, the plaintiffs obtained an interim injunction on March 2, 1973 restraining the defendants from proceeding with the annual general meeting of the Branch unless the plaintiffs and 176 others similarly affected had been given notice of the meeting and were permitted to attend and vote thereat. On March 10, the defendants filed a Notice of Motion to set aside the *ex-parte* order. The application was, however, dismissed on April 23. In dismissing the application, I held that there was a serious question to be tried at the proper hearing of the plaintiffs' claim which would affect not only the plaintiffs' right to participate at the annual general meeting but also the right of the other members who were alleged to be similarly affected. I also held that, if the interim injunction were set aside, then irreparable damage would be caused to the right of the plaintiffs and the other members of the political party. The interim order accordingly stands pending the proper hearing of the suit filed by the plaintiffs.

By Notice of Motion dated August 9, 1973, the plaintiffs applied for judgment and costs under Order 32 Rule 6 of the Rules of the Supreme Court, *i.e.* for an order that the defendants be perpetually restrained by injunction from proceeding with the annual general meeting of the Semenyih Branch unless the plaintiffs and 176 others similarly affected were given notice of the meeting and were permitted to attend and vote thereat. The application was based on the letter of the defendants' solicitors dated June 4, the relevant part of which reads as follows: